DEC 13 1
MICHAEL RODAK, JR

Supreme Court of the United States

October Term, 1974
No. 74-493

OHIO CIVIL RIGHTS COMMISSION,
Petitioner,

vs.

OSTEP (REX) LYSYJ, dba KENT TRAILER PARK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Ostep (Rex) Lysyj, dba Kent Trailer Park, respectfully prays that the petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Ohio entered in this case on June 12, 1974 and the petition for rehearing denied on July 31, 1974 be denied.

REASONS FOR DENYING THE WRIT

1. THE DECISION BY THE SUPREME COURT OF OHIO IS NOT STATE ACTION WHICH VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND IS NOT A RETREAT FROM THE STATE OF OHIO'S PAST AND CURRENT LAWS CONCERNING UNLAWFUL DISCRIMINATION AND IS NOT A DILUTION OF THE COMMISSION'S REMEDIAL POWERS.

The Ohio Legislature has provided one means of dealing with discrimination by enacting a comprehensive set of Laws concerning various types of discriminatory practices. These laws constitute chapter 4112 of the Ohio Revised Code. The Ohio Laws Against Discrimination are not, however, an exclusive remedy. Alternative forms of remedial relief are available and will be discussed in a later section.

The Supreme Court of Ohio determined that there was unlawful discrimination present in the instant case, and concurred in the opinion that the remedy provided by the General Assembly in R.C. Section 4112.05 (G), for the violation of this one particular statute R.C. Section 4112.02 (G) was the issuance of a cease and desist order, Petitioner's Appendix "A". Since the State of Ohio has in fact provided a remedy in Section 4112.05 (G) and since there are avenues of recovery available to petitioners, through the courts, there is a lack of any substantial federal question to be decided by the Court. If a plaintiff can place himself within the purview of the proper state agency or tribunal to obtain redress of his grievances and he has not utilized these state remedies, then there

is a lack of a substantial federal question. *Levitt & Sons, Inc. v. Division Against Discrimination*, 363 U.S. 418, 4 L. Ed. 2d 1515, 80 S. Ct. 1257 (1960).[1]

Petitioner cites *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) which is a decision on fair employment practices. Chapter 4112 of the Revised Code provides the remedies mentioned in the above decision. Section 4112.02 (G) ". . . (Remedies) including, but not limited to hiring, reinstatement, or upgrading of employees with, or without back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance." The Ohio Laws against discrimination have allowed for back pay and other affirmative relief in fair employment cases through a specific grant of authority by the General Assembly to the Ohio Civil Rights Commission. There is no conflict between federal fair employment practice decisions and Ohio law. However, the instant case does not involve fair employment practices.

The decision of the Supreme Court of Ohio construing Section 4112.02 (G) is not inconsistent with *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, 39, 249 N.E.2d 907, 910 (1969), *cert. denied*, 396 U.S. 1004 (1970). In *Weiner* the Court held that when general contractors bid on a project jointly funded by the State and Federal Government it is permissible, in accord with 42 U.S.C. 2000 (e) (2), to require the bidders to provide an affirmative action plan for the employment of minorities. The Supreme Court of Ohio has not retreated from that position by its finding that Section 4112.05 (G) provides solely for a cease and desist order in Public Accommodation cases.

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1. An appeal from a judgment of the Supreme Court of New Jersey (31 N.J. 514, 158 A.2d 177) was dismissed per curiam without opinion for want of a substantial federal question (Black, J., dissenting).

The decision of the Supreme Court of Ohio is not violative of the Fourteenth Amendment to the United States Constitution as set forth in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *Evans v. Newton,* 382 U.S. 296 (1966); *Hunter v. Erickson,* 393 U.S. 385 (1969); and *Reitman v. Mulkey,* 387 U.S. 369 (1967). The decision involves the state in preventing and eliminating discrimination by use of cease and desist orders, Section 4112.05 (G), and other alternative remedies through the courts of proper jurisdiction.[2]

The Supreme Court of Ohio was not willing to imply a board grant of power to an administrative agency,[3] but in a footnote the Court stated, "Indeed, a question which we need not now decide is whether, by statute, such a power can be lodged in other than a judicial tribunal." The Supreme Court of Ohio acted in accord with the long held principle that Constitutional questions should not be determined abstractly or in a hypothetical case, or anticipated in advance of the necessity for determination or in advance of enactment. *Helvering v. Griffiths,* 63 S. Ct. 636, 318 U.S. 371, 87 L. Ed. 843 (1943); *Peters*

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2. The Supreme Court of Ohio stated in its opinion that "the Power to award damages to a person suffering loss as a result of the unlawful action of another has traditionally been limited to judicial proceedings."

3. Petitioner's Appendix A "We find nothing in R.C. 4112.05 (G) which indicates that the General Assembly attempted to authorize appellant to award either compensatory or punitive damages. The authority included in the statute to award "back pay" refers to a specific and limited type of remedy to be used in fair employment cases. It does not constitute a board grant of power. The authority to take 'affirmative action' may well include extensive powers to effectuate the purpose of the Civil Rights Acts, but, under existing statutory language, those powers are to be directed towards ending the unlawful discriminatory practice and securing compliance with the cease and desist order. If the General Assembly had intended to authorize the commission to grant compensatory or punitive damages, it would have been a simple matter to explicitly so provide, as was done elsewhere in the Act. See, e.g. R.C. 4112.051 (E)."

v. Hobby, App. D.C., 76 S. Ct. 790, 349 U.S. 331, 99 L. Ed. 1129 (1955); *Rescue Army v. Municipal Court, Cal.,* 67 S. Ct. 1409, 331 U.S. 541, 91 L. Ed. 1666 (1947); *Thrope v. Housing Authority of City of Durham, N.C.,* 89 S. Ct. 518, 393 U.S. 268, 21 L. Ed. 2d 474 (1969).

The ability of a state administrative agency to award damages, if so authorized by the legislature, has not been decided by the Supreme Court of Ohio. Since there has been no determination of this question the appeal by the Commission is not yet ripe and calls for a premature ruling on a contingent constitutional question.

2. THE DECISION OF THE SUPREME COURT OF OHIO IS NOT STATE ACTION WHICH VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND DOES NOT FORECLOSE RELIEF TO VICTIMS OF THE DISCRIMINATORY PRACTICES PROHIBITED BY THE OHIO LAWS AGAINST DISCRIMINATION.

The Ohio Civil Rights Commission represents one forum available to victims of the discriminatory practices prohibited by Chapter 4112 of the Ohio Revised Code. It is not a monopoly on the relief available and unlike some state statutes is not an exclusive remedy.

Section 4112.051 R.C. provides for the commencement of actions in the Court of Common Pleas.

> "Section 4112.051 Actions in a Common Pleas Court.
>
> (A) The rights granted by division (H) of Section 4112.02 of the Revised Code may be enforced by aggrieved private persons by filing civil actions in a court of Common Pleas * * * A civil action

shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occurred."

Section (H) 4112.02 provides in part that it shall be an unlawful discriminatory practice:

"For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold housing accommodations from any person because of the race, color, religion, sex, ancestry, or national origin, of any prospective owner, occupant, or user of such housing:"

"Housing accommodations" are defined by Section 4112.01 of the Revised Code.

"(J) Housing Accommodations includes any building or structure or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or lease."

Clearly Respondent's trailer park constituted a "housing accommodation" as well as a "public accommodation". This is evidenced by the fact that the Civil Rights Commission attempted to amend its complaint the day before the initial hearing, to include violations of Section 4112.02 (H) (1) and (4). The hearing examiner dismissed the amended complaint because it was untimely. (R. pp. 25-26) The petitioner did in fact have an alternative avenue for redress through Chapter 4112 R.C.

Petitioner, in addition to the remedies provided in Chapter 4112 R.C. could have availed itself of the normal

judicial procedure with a civil law suit. The tort of intentional infliction of emotional distress is recognized in Ohio. *Cincinnati Northern Traction Co. v. Rosnagle*, 84 Ohio St. 310, 95 N.E. 884 (1911); *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948); *Morgan v. B.F. Goodrich Co.*, 23 Ohio Law Abs. 541 mco March 24, 1937. A Plaintiff has a right to damages merely for humiliation, *M.J. Rose Co. v. Lowery*, 33 Ohio App. 488, 169 N.E. 716 (1929). If there is a wrongful eviction, a lessee may also recover all damages sustained by reason of the wrongful eviction, caused by the lessor, in addition to the value of the unexpired term of the lease. *Hoffstetter v. Harris*, 23 Ohio N.P. (n.s.) 579, *aff'd by Ct. of Appeals* (1921); *Grunau v. Faflik* (App.), 50 Ohio Law Abs. 142, 77 N.E.2d 719 (1947). Since Section 4112.08 expressly states that the procedures and remedies in chapter 4112 are *not* exclusive, petitioner had the option of filing suit in Common Pleas Court for wrongful eviction, intentional infliction of emotional distress and humiliation.[4] The petitioner made the election of remedies, but the decision was voluntary and not forced upon either the original plaintiff or the Civil Rights Commission.

The New York State Courts have determined that the State Division of Human Rights has no authority in administrative proceedings to order payment of damages for mental anguish and pain and suffering arising out of racial discrimination. The Court said that if the persons discriminated against had chosen the alternative procedure of bringing civil action in Court, they could have recovered all damages that they could establish. The agency could award compensatory "out of pocket damages" because it

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4. Section 4112.08 provides in part "Nothing contained in Sections 4112.01 to 4112.08 and Section 4112.99 of the Revised Code, shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, sex, national origin, or ancestry."

was specifically granted this power by the legislature. Therefore, to allow the administrative agency to award for other than the specific "out of pocket expenses" would render meaningless the statutory alternative of permitting a person to seek relief in Court. When the election to seek the administrative remedy was made that remedy is controlled by the statutes. *State Div. of Human Rights v. Lupino,* 35 App. Div. 2d 107, 313 N.Y.S.2d 28 (1970); *Ernsteins v. State Div. of Human Rights,* 35 App. Div. 2d 599, 313 N.Y.S.2d 856 (1970), 40 A.L.R.3d 1290 anno. Civil Rights Section 3(b) at 1304-5. In the instant case when petitioner elected the administrative remedy it became bound by the provisions of Chapter 4112 for establishing that remedy. The Ohio Supreme Court has determined that the remedy in this case, by statute is a cease and desist order. Persons in Ohio, as in New York, can elect to file a civil action to receive monetary awards. In addition, at the time of the commencement of this action by the Civil Rights Commission in December of 1970, R.C. Section 2901.35 was in effect. R.C. Section 2901.35 prohibited public accommodations discrimination and provided for damages. While it is true that this section was repealed, effective January 1, 1974 it was available to the petitioner in this case with regard to the respondent.

In *Boddie v. Connecticut,* 401 U.S. 371 (1971) the Court established the legal standards for due process and the principle that a party's opportunity to be heard must not be foreclosed. Applying the three part test introduced in *Ortwein v. Schwab,* 410 U.S. 656 (1973) for determining a violation of the due process clause it is apparent that there is no violation. In *Ortwein* the applicability, to indigents, of a $25.00 filing fee for docketing cases with the supreme court was upheld under the theory that there were alternative means of relief available through the Administrative Welfare Agency. The test used by the Court

in rendering its decision was: (1) the interest involved must be of a fundamental nature, (2) those interests must be significantly affected by the statute, as construed, and (3) alternative methods to obtain the relief sought must not be available. Even if the first two parts of the test are satisfied the fact that there are alternative means available to aggrieved persons in Ohio will cause the alleged violation to fail. As in *Ortwein* the Court should uphold R.C. Section 4112.02 (G) as construed by the Supreme Court of Ohio.

3. VICTIMS OF RACIAL DISCRIMINATION IN PUBLIC ACCOMMODATIONS HAVE A RIGHT TO A REMEDY THAT INCLUDES COMPENSATORY AND PUNITIVE DAMAGES.

In Ohio the right to compensatory and punitive damages is recognized and available to aggrieved persons (*supra*). In *Jackson v. Concord Co.*, 54 N.J. 113, 125-28, 253 A.2d 793, 800-01 (1969), the New Jersey court was applying a civil rights statute[5] that was an exclusive remedy. And in such a case it may well be that compensatory and punitive damages must be awarded by a state agency, however, R.C. Section 4112.02 (G) is not an exclusive remedy. The remainder of Petitioner's cases deal either with a judicial application of statutes, as opposed to administrative agencies or with fair employment practices. A judicial application of a state statute may foreclose an individual's right to be heard if there are no alternative means of obtaining relief, but this is not

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5. N.J.S.A. 10:5-27 ". . . as to practices and acts declared unlawful by section eleven of this act [N.J.S.A. 10:5-12], the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, Civil or Criminal, based on the same grievances of the individual concerned."

the problem under consideration. As stated previously the Fair Employment Practice Statutes in Chapter 4112 R.C. comply with federal standards (*supra*).

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Ohio be denied.

Respectfully submitted,

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